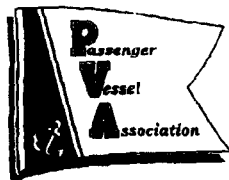


335981



DEPT. OF TRANSPORTATION
DOCKETS

2005 APR 19 P 3:11

April 19, 2005

Docket Management Facility
U.S. Department of Transportation
400 7th Street SW
Washington, DC 20590-0001

PASSENGER

VESSEL

ASSOCIATION

By fax to 202-493-2251

Re: USCG-2005-20380 - Port Access Routes Study of Potential
Vessel Routing Measures to Reduce Vessel Strikes of North Atlantic
Right Whales

Ladies and Gentlemen:

The Passenger Vessel Association is pleased to submit these comments to the Coast Guard's docket on "Port Access Routes Study of Potential Vessel Routing Measures to Reduce Vessel Strikes of North Atlantic Right Whales," as published in the *Federal Register* of February 18, 2005.

801 N. Quincy Street
Suite 200
Arlington,
VA 22203

The Passenger Vessel Association (PVA) is the national trade association for U.S.-flagged passenger vessels of all types. It represents the interests of owners and operators of passenger and vehicular ferries, whalewatching operators, overnight cruise ships, dinner cruise vessels, sightseeing and excursion vessels, passenger and vehicular ferries, private charter vessels, windjammers, gaming vessels, and amphibious vessels.

Phone
(800) 807-8360
(703) 807-0100

Fax:
(703) 807-0103

PVA currently has 600 vessel and associate members. Our vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

Email
pva@vesselalliance.com

Website
www.passengervessel.com

The Passenger Vessel Association has previously submitted comments to the National Marine Fisheries Service responding to that agency's Advance Notice of Proposed Rulemaking (ANPRM) regarding ship strikes of right whales. Those comments are included with this submission, and we respectfully request that the information contained in that submission be taken into account by the Coast Guard in conducting this PARS.

Data on Vessel Strikes of Right Whales

PVA has repeatedly sought to impress upon policymakers that existing data made public by NMFS show no instances in which a whalewatching vessel, a ferry (high-speed or traditional-speed), or a coastal small-ship cruise vessel has struck a northern right whale. The data base lists 19 instances of presumed vessel strikes of a northern right whale in waters of the eastern U.S. (nine) and eastern Canada (ten). Four vessels known to be involved in such strikes have been identified. One was a container vessel, one was a Coast Guard vessel, and two were Navy ships. Despite this, most proposed measures to address the problem of vessel strikes of right whales embrace a wide range of vessels, including those operated by our members. It is hard to understand how a federal agency might propose a rule or recommend vessel routing measures with adverse consequences on smaller U.S.-flag passenger vessels, a group whose vessels have been in no way implicated in the problem!

Flawed NMFS Economic Analysis

Until recently, federal officials grappling with this issue have failed to consider that their contemplated measures might affect the domestic U.S.-flagged passenger vessel industry in any way. NMFS' economic analysis supporting its proposed rule is incomplete and seriously flawed. It omits any analysis, even of the most cursory kind, of the domestic passenger vessel industry (including ferries, whalewatching vessels, and smaller overnight cruise ships). In undertaking its Port Access Route Study (PARS), the Coast Guard must not repeat NMFS' mistake. PVA encourages the Coast Guard to "reach out" to the domestic passenger vessel industry, especially the PVA members identified below, to obtain specific details of their current operations and to evaluate how the possible recommendations emerging from this PARS would affect them.

The Coast Guard must produce this PARS for submission to Congress no later than eighteen months after enactment of Public Law 108-293. This deadline will occur in early February 2006 (not in January, as erroneously stated in your *Federal Register* notice). However, the Coast Guard should note that this very tight timetable does not mesh well with the schedule for NMFS consideration of the ANPRM. It has become clear that NMFS needs to develop a much more defensible economic impact analysis of its proposed Draft Strategy than has thus far been made available. In particular, there must be a serious look as to how possible vessel routing measures and speed limits may adversely affect domestic passenger vessel operations. NMFS representatives acknowledged this need at the April 5 meeting of the Northeast Implementation Team in Baltimore. This economic analysis is crucial for policymakers to make an informed choice, and it will be difficult for the Coast Guard to make meaningful recommendations to Congress in its

absence. In particular, how could the Coast Guard "[r]ecommend implementing the vessel routing measures identified in the NMFS ANPRM for the two areas" (one of the possible outcomes of your study) without this crucial data?

Ferries Across Cape Cod Bay to Provincetown

Until now, reviews of vessel traffic in Cape Cod Bay have focused on cargo vessels, including barges. However, in season, there are ferries between Provincetown and either Boston or Plymouth. These ferries are a mix of high-speed and traditional-speed vessels. Operators include Boston Harbor Cruises, Bay State Cruises, and Capt. John Boats. According to information posted on the web sites of these companies, the ferry season runs from mid-May to mid-October. It may be that the ferry season is such it overlaps only slightly with the prime aggregation period for right whales. Nonetheless, in conducting its PARS and making recommendations, the Coast Guard should obtain detailed information on the routes traditionally followed by each of these ferry operators. In addition, the Coast Guard should bear in mind that these ferries compete with land-based transportation modes and that a key attraction of the vessels is their time advantage. The Coast Guard must not recommend measures that would cripple the ferries' time advantage, either by imposing mandatory routes of greater distances than currently traveled or by establishing vessel speed limits on the ferries.

Whalewatching Excursions near Race Point

A thriving commercial whalewatching industry uses the waters within the northern sector of the PARS study, especially the waters of the Gerry Studds Stellwagen Bank National Marine Sanctuary. Whalewatching vessels generally begin their season in spring (April or May) and operate well into October. The vessels depart from various port locations, including Provincetown, Barnstable, Boston, Gloucester, Plymouth, and Newburyport.

PVA's membership embraces many (but not all) of the commercial whalewatching companies in the area. Our members include Dolphin Fleet of Provincetown (www.whalewatch.com), Boston Harbor Cruises (www.bostonharborcruises.com), Massachusetts Bay Lines, Boston (www.massbaylines.com), Portuguese Princess Whalewatching, Provincetown (www.princesswhalewatch.com), Hyannis Whale Watcher, Barnstable (www.whales.net), Cape Ann Whale Watch (Gloucester) (www.seethewhales.com), Cape Cod Cruises/Capt. John Boats, Plymouth (www.whalewatchingplymouth.com), and Yankee Fleet, Gloucester (www.yankeefleet.com).

A typical commercial whalewatching cruise lasts between three and four hours. Since the vessels converge on the viewing sites in the National Marine

Sanctuary from the north, west, and south, there is no single route by which the vessels travel. Any recommendations arising from the PARS must ensure that these vessels can continue to travel from their home ports to the whale viewing areas.

Keeping the length of the trip manageable and attractive for customers is essential for the economic viability of a commercial whalewatching venture. The entire cruise must not be too long in duration, the amount of time in the whale viewing area must be maximized, and the amount of time traveling to and from the whale viewing area must be minimized. Otherwise, the trip becomes less appealing to the customer. In making recommendations on routing measures pursuant to the PARS, the Coast Guard must not alter the basic character of the whalewatching cruise that has proven successful and popular in this area of New England.

In conducting this PARS, the Coast Guard should factor in the existing federal regulatory requirement that no vessel should approach closer than 500 yards to a right whale and should move away beyond this distance if it inadvertently comes closer. The Coast Guard should also take note of any current vessel routing directives in the national marine sanctuary management plan or measures under consideration for a future revision to that plan.

Expanding the Geographic Scope of the PARS

PVA notes that certain comments to this docket urge the Coast Guard to expand the geographic scope of the PARS. PVA has chosen not to describe the various services and operations of its members south of Cape Cod in the Northeast and Mid-Atlantic areas, as these locations are not included in the areas discussed in your *Federal Register* notice. However, many more operators could be potentially affected if the Coast Guard extends the geographic scope of the PARS.

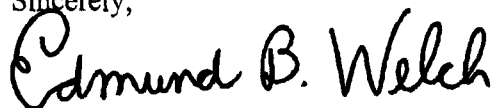
We urge you not to extend the geographic scope of the PARS. Should you choose to do so, however, PVA must be given ample opportunity to submit comments on its members' operations in the additional areas.

Conclusion

The Passenger Vessel Association recognizes that the Coast Guard must fulfill its statutory mandate to conduct the PARS. We urge the Coast Guard to give careful attention to how your recommendations may affect ferries, whalewatching vessels, small-ship overnight cruise vessels, and others in the domestic U.S.-flagged passenger vessel industry. We recommend that you clearly point out to Congress that this segment of the maritime industry may be particularly vulnerable to economic harm if inappropriate routing measures are chosen. We suggest that your report note that there has been no

satisfactory economic analysis of impacts on the domestic passenger vessel industry. We recommend that you "reach out" to the PVA members identified in this submission for more detailed information about their operations. The Passenger Vessel Association stands ready to provide additional resources and material to the Coast Guard as it undertakes this PARS.

Sincerely,

A handwritten signature in black ink that reads "Edmund B. Welch". The signature is written in a cursive style with a large, stylized "E" and "W".

Edmund B. Welch
Legislative Director



Boston Harbor Cruises

One Long Wharf
 Boston, MA 02110
 Phone: 617-227-4321
 Toll Free: 1-877-733-94253
 Fax: 617-723-2011

Provincetown Ferry

2005 P-Town Fast Ferry Schedule			
Departs from Long Wharf in Boston and MacMillan Wharf in Provincetown			
May 21 - May 22			
Boston @ 9:00 am			
P-Town @ 4:00 pm			
May 26 - May 30: Full schedule for Memorial Day weekend			
<i>Thursday - Monday:</i>			
Boston @ 9:00 am, 2:00 pm & 6:30pm			
P-Town @ 11:00 am, 4:00 pm & 8:30 pm			
May 31 - June 17			
<i>Daily</i>			
Boston @ 9:00 am			
P-Town @ 4:00 pm			
June 18 - September 5:			
<i>Monday - Wednesday:</i>			
Boston @ 9:00 am & 2:00 pm			
P-Town @ 11:00am & 4:00pm			
<i>Thursday - Sunday:</i>			
Boston @ 9:00 am, 2:00 pm & 6:30 pm			
P-Town @ 11:00 am, 4:00 pm & 8:30 pm			
September 6 - October 10:			
<i>Monday:</i>			
Boston @ 9:00 am & 2:00 pm			
P-Town @ 11:00 am & 4:00 pm			
<i>Tuesday & Thursday:</i>			
Boston @ 9:00 am			
P-Town @ 4:00 pm			
<i>Friday - Sunday:</i>			
Boston @ 9:00 am, 2:00 pm & 6:30 pm			
P-Town @ 11:00 am, 4:00 pm & 8:30 pm			
Peak Season Schedule			
<i>Monday - Wednesday:</i>			
Boston @ 9:00 am & 2:00 pm			
P-Town @ 11:00 am & 4:00 pm			
<i>Thursday - Sunday:</i>			
Boston @ 9:00 am, 2:00 pm & 6:30 pm			
P-Town @ 11:00 am, 4:00 pm & 8:30 pm			
Arrives only 90 minutes after departure time			
2005 Rates			
Ferry	Adult	Senior	Child
Round Trip	\$59.00	\$54.00	\$49.00



Plymouth to Provincetown

EXPRESS

508.747.2400 800.242.2469

"The fastest and most direct route to Provincetown!"

Prices & Schedule

DATES OF OPERATION: The Plymouth to Provincetown Ferry runs daily June 28 through September 5.

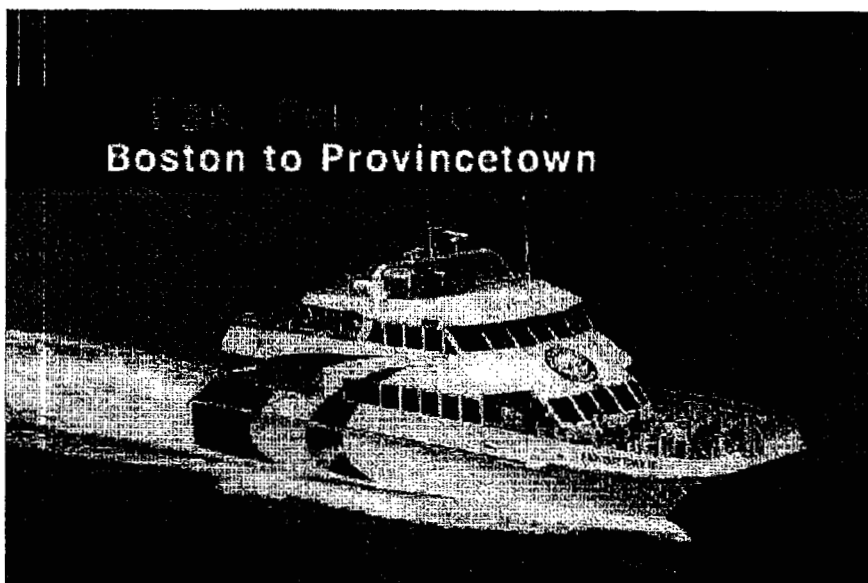
APPROXIMATE TRAVEL SCHEDULE:

- Leave Plymouth 10:00 am
- Arrive Provincetown 11:35 a.m.
- Depart Provincetown 4:30 pm
- Arrive Plymouth 6:00 pm

\$32.00	\$22.00	\$27.00	\$20.00*	\$5.00

*No, one-way fares in July and August

DETAILS: The ferry leaves from the State Pier, right next to the Mayflower II, and the Pilgrim Belle. Look at the "How to Find Us" section of this Web site for directions and maps. Please arrive early, to allow time for parking and check in. See you onboard!



Boston to Provincetown

Fast Ferry Service Aboard the Provincetown III

Daily service begins Friday,
May 20th, 2005 and runs
every day through October
16th, 2005 (special blackout
dates October 3 - 6 and 11 -
14).

Fares	One Way	Round Trip
Adult	\$12.00	\$22.00
Senior	\$10.00	\$18.00
Child	\$7.00	\$13.00
Bike	\$5.00	\$10.00

Depart Boston	Arrive Provincetown	Depart Provincetown	Arrive Boston	Frequency
08:00	09:15	10:00	11:15	Daily
12:00	13:15	14:00	15:15	Daily
18:00	19:15	20:00	21:15	Daily

**Excursion Service
Aboard the Provincetown
II:**

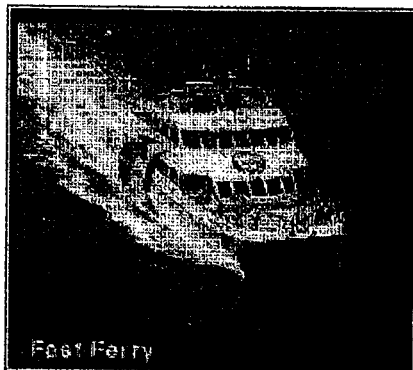
The Provincetown II runs from
June 24th, 2005, through
September 5th, 2005 on
Friday, Saturday and Sunday.
It will also run on Labor Day
(September 5th).

*Fares	One Way	Round Trip
Adult	\$18.00	\$22.00
Senior	\$16.00	\$20.00
Child	\$9.00	\$12.00
Bike	\$2.00	\$4.00

Depart Boston	Arrive Provincetown	Depart Provincetown	Arrive Boston	Frequency
Friday, Saturday, Sunday	Friday, Saturday, Sunday	Friday, Saturday, Sunday	Friday, Saturday, Sunday	Friday, Saturday, Sunday

** - price includes embarkation fee imposed by the
Commonwealth of Massachusetts.*

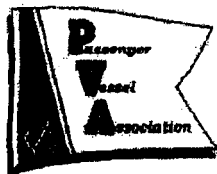
Bay State Cruise Company 200 Seaport BLVD. Suite 75, Boston, MA 02210
([Click here to email us](#)) 617.748.1428



Fast Ferry



Provincetown II



PASSENGER
VESSEL
ASSOCIATION

November 15, 2004

Chief, Marine Mammal Conservation Division
Attn: Right Whale Ship Strike Strategy
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20919
By Fax to 301-427-2522

Ladies and Gentlemen:

The Passenger Vessel Association (PVA) submits these comments in response to the Advance Notice of Proposed Rulemaking, as published in the *Federal Register* of June 1, 2004, July 9, 2004, and September 13, 2004.

PVA is the national trade association for U.S.-flagged passenger vessels of all types. It represents the interests of owners and operators of dinner cruise vessels, sightseeing and excursion vessels, passenger and vehicular ferries, private charter vessels, whalewatching operators, windjammers, gaming vessels, amphibious vessels, and overnight cruise ships.

PVA has been in operation for over 30 years. We currently have more than 575 vessel and associate members. Our vessel-operating members range from small family businesses with a single boat to companies with several large vessels in different locations to governmental agencies operating ferries.

Our associate members are key suppliers to the passenger vessel industry, including marine architects, vessel builders and decorators, insurance companies, publishers, food supply companies, computer software vendors, marine equipment suppliers, engine manufacturers, and others.

After reviewing your proposed rule and the accompanying supporting documents and after participating in meetings on this issue conducted by your representatives, PVA has concluded that the agency has failed to make the necessary case for vessel speed limits and routing restrictions for U.S.-flagged ferry, whalewatching, and small-ship coastal cruise vessels. PVA urges the National Marine Fisheries Service (NMFS) to rethink its proposal.

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www.passengervessel.com

INCOMPLETE ECONOMIC IMPACT STUDY

On several occasions, most recently at your informal October 25 public meeting in Port Newark, PVA has pointed out that NMFS's economic analysis supporting this proposed rule is incomplete and seriously flawed. It omits any analysis, even of the most cursory kind, of a segment of the U.S.-flagged maritime industry that will be directly impacted by the proposed rules – the domestic passenger vessel industry. PVA represents a substantial portion of this industry segment. Among the types of vessels in PVA's membership that may be impacted are ferries (particularly, but not exclusively, high-speed ferries), whalewatching vessels, and overnight cruise ships.

The Kite-Powell and Hoagland document entitled "Economic Aspects of Right Whale Ship Strike Management Measures" mentions the word "ferry" exactly once (in the context of cruise ship traffic in Portland, Maine). It does not address whalewatching vessels at all. Its analysis of impacts on cruise ships appears to omit any consideration of smaller-sized U.S.-flagged coastal cruise vessels.

Not only is there no analysis of the possible direct impact of the rules on passenger vessel operators, NMFS has made no studies about how these industry segments contribute to the economics of their region or, in the case of ferries, their role in regional and national transportation networks.

As an appendix, PVA has listed companies from its membership that operate ferry, whalewatching, and small-ship cruise vessels in the areas potentially subject to right whale ship strike measures. This list is probably not exhaustive; there are other vessel operators in these categories that do not belong to the Passenger Vessel Association.

It is imperative that NMFS develop an economic impact analysis of the proposed rule's impact on U.S.-flagged passenger vessels of all types. PVA offers its assistance to you in this regard. Most, if not all, of these PVA members will be considered to be small entities under the Small Business Administration's guidelines.

DATA ON VESSEL-WHALE STRIKES

NMFS has made public a data base of ship strikes of whales. This historical data in no way justifies applying your proposed rule to U.S.-flagged whalewatching, ferry, and small-ship coastal cruise vessels.

According to your data base, there have been no instances in which a whalewatching vessel, a ferry (high-speed or traditional speed), or a coastal cruise vessel has struck a northern right whale. The data base lists 19 instances of presumed vessel strikes of a northern right whale in waters of the eastern U.S. (nine) and eastern Canada (ten). Four vessels known to be involved in such strikes have been identified. One was a container vessel, one was a Coast Guard vessel, and two were Navy ships.

It is ironic that three of the four vessels identified as involved in northern right whale strikes would not be covered in your proposed rule! Yet your rule could affect scores of whalewatching, ferry, and small-ship coastal cruise vessels, none of which has ever been identified as having struck a northern right whale.

In fact, the data base demonstrates that there are but a limited number of whale strikes in all of North America by whalewatching, ferry, and small-ship coastal cruise vessels

In the eastern U.S., there are four reported strikes of whales by whalewatching vessels. Two incidents involved minke whales, and two involved humpback whales. This is out of a total of 47 total strikes in the eastern U.S.

In eastern Canada, there are five reported strikes of whales by whalewatching vessels. Three incidents involved finback whales, one involved a minke whale, and one involved a humpback whale. This is out of a total of 24 strikes in eastern Canada.

On the west coast (U.S. and Canada combined), there is a single report of a whalewatching vessel striking a gray whale. This is out of a total of 50 west coast strikes.

In Alaska and Hawaii, there are six reports of a whalewatching vessel striking a whale. Five incidents involved a humpback whale. In the other incident, the species of whale could not be determined. This is out of a total of 20 Alaskan and Hawaiian strikes.

As for ferries, there are no reports of a ferry vessel striking a whale of any species in either the eastern U.S. or eastern Canada. In western Canada, there is a single report of a ferry striking an orca. In Hawaii and Alaska, there is a sole report of a high-speed ferry striking a humpback whale.

It is hard to understand how a federal agency can propose a rule with adverse consequences on a group of vessel operators when these types of vessels have in no way been implicated in the problem of strikes of northern right whales! "Stretching" the data in this way makes the proposed rule vulnerable to a claim of violating the guidelines issued to implement the federal Data Quality Act.

EFFECTS ON PVA MEMBERS

A typical ferry adheres to a set route and schedule. In some instances, the ferry vessel provides the only public transportation on that route. However, in many other situations, the ferry provides a means of transportation that is an alternative to other modes. In such cases, the ferry's attractiveness to its riders is in part a function of the convenience it provides. If the ferry's voyage is extended significantly because of vessel speed limits or routing restrictions, the customers may choose to avail themselves of the competing transportation modes. A loss of riders harms the economic viability of the ferry operation.

This is particularly true in the case of a high-speed ferry. Such a vessel has been designed specifically to achieve a higher cruising speed (for example, 25 knots or more). This speed enables the vessel to operate on and attract riders to a route that probably could not be served by a traditional-speed vessel. For example, it would likely be infeasible for a traditional-speed vessel to serve commuter ferry route that runs from Atlantic Highlands, New Jersey, to Manhattan. Placing a speed limit of 10 or 12 knots on a high-speed ferry completely nullifies the advantages offered by such a vessel to its riders.

NMFS should not assume that only high-speed ferries will be impacted by vessel speed limits. Even a traditional-speed ferry vessel may routinely travel in the 10-14 knot range.

Similarly, a whalewatching vessel must maintain its attractiveness to its customer base. A typical whalewatching vessel must travel some distance from its home port to reach those waters in which marine mammals are likely to be viewed. After spending a designated amount of time in those waters, the vessel must return its passengers to shore. In this respect, a whalewatching vessel is much like a charter fishing boat going out to the Gulf Stream. If speed limits or routing restrictions result in adding excessive travel time to and from the whale viewing waters, the operator will lose significant portions of its customers, who will choose to spend their discretionary dollars on some more convenient activity.

Your proposed management measures envision identifying certain areas where whales traditionally congregate and establishing seasonal vessel routing restrictions and speed limits in those areas. One such area in the Northeast would be in Cape Code Bay. Ferries serving Provincetown have no alternative to traveling through this zone. A second management area is off Race Point. Many Massachusetts-based whalewatching vessels have no alternative but to travel to and through these waters. Thus, in these particular management areas, PVA members will be directly impacted.

Your rule anticipates that there will be seasonal management areas at the entrance of several ports along the eastern seaboard. It is unclear as to where the western (landward) boundaries of these zones will be established. Depending on the placement of these boundaries, the management areas may overlap the normal routes of several important ferry operators (New York, Delaware Bay, North Carolina).

Your rule also envisions dynamic management zones, to be designated when groups of whales are seen in waters other than their most common areas. PVA members from Maine to the Southeast will be potentially impacted by such dynamic zones.

LEGAL AUTHORITY FOR RIGHT WHALE RULE NEEDS TO BE CLARIFIED

Your *Federal Register* document states that NMFS proposes to implement these measures through its broad rulemaking authority pursuant to the Marine Mammal

Protection Act (MMPA) and Endangered Species Act (ESA). However, there are limitations regarding the applicability of these statutes, and to date, NMFS has not meaningfully addressed them in any document presented to the public.

Your proposed management restrictions are intended to apply to vessels that operate in the U.S. territorial sea and in the U.S. Exclusive Economic Zone (EEZ) (which generally extends to 200 miles from shore). In accordance with President Reagan's 1988 proclamation 5928, the U.S. territorial sea extends to 12 miles from shore for international purposes, but extends only to 3 miles from shore for purposes of certain domestic statutes; the proclamation specifically disclaimed any intention to "extend or otherwise alter existing Federal or State law or any jurisdictional rights, legal interests, or obligations derived therefrom."

The Endangered Species Act makes it "unlawful for any person subject to the jurisdiction of the United States to—(B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas;" (Title 16 *United States Code* Section 1538(a)(1)).

Since a U.S.-flagged vessel is always "subject to the jurisdiction of the United States," the ESA provides legal authority for your proposed rule to apply to a U.S.-flagged vessel operating in either the territorial sea or on the Exclusive Economic Zone.

However, under international law, a foreign-flagged vessel operating outside of the U.S. territorial sea is not "subject to the jurisdiction of the United States." Therefore, the ESA's prohibition against that vessel engaging in a prohibited "taking" will apply only when the foreign vessel is operating on the territorial sea of the United States. In the case of the ESA, the territorial sea extends only to 3 miles from shore, as President Reagan's proclamation of the 12-mile territorial sea specifically did not apply to domestic statutes, and Congress has never amended the ESA to extend its coverage to a 12-mile territorial sea.

A document prepared for NMFS by Mr. Bruce Russell asserts, "An interpretation of the Endangered Species Act provides authority for imposing operation restrictions on all U.S. and foreign flagged vessels." However, the document provides no explanation of this statement. Whose interpretation does this refer to? Is it a written document? Why has it not been made available to the public?

The Marine Mammal Protection Act has a broader geographical reach than does the ESA. It defines "waters under the jurisdiction of the United States" as "(A) the territorial sea of the United States [*note: again, a 3-mile territorial sea for purposes of this statute*]; (B) the waters included within a zone, [*the outer boundary of which*] ... is 200 nautical miles from the baseline from which the territorial sea is measured." Title 16 *United States Code* Section 1362(15). Thus, the MMPA's prohibition against taking of a marine mammal can apply to any vessel, regardless of flag, operating on the waters of the U.S. territorial sea or the Exclusive Economic Zone.

However, Title 16 *USC* Section 1373(b) establishes factors to be considered when the Secretary prescribes regulations pursuant to the MMPA. The Secretary must give "full consideration" to "existing international treaty and agreement obligations of the United States." Therefore, the U.S. must consider its responsibilities and obligations under the MARPOL Convention and its annexes. MARPOL establishes a procedure by which an area of the high seas which needs special protection and which is vulnerable to environmental damage by maritime activities can be identified as Particularly Sensitive Area (PSA) by the International Maritime Organization (IMO). To achieve international recognition for a designed PSA, a coastal state has to submit a proposal to IMO's Maritime Safety Committee. A recognized area can be protected in three ways: (1) special routing measures; (2) as an area to be avoided, and (3) other navigational duties such as piloting. Thus, for NOAA to comply with the MMPA's mandate to fully consider international treaty and agreement obligations of the U.S. and to comply with its obligations under MARPOL, the U.S. must first seek PSA designation by IMO before it can use establish restrictive zones in the EEZ to implement vessel movement restrictions for the protection of right whales. It can not accomplish this with a simple regulation pursuant to the MMPA. Russell acknowledges, "Several of the recommendation, in particular mandatory routing and areas to be avoided in international waters, may require approval by the International Maritime Organization."

Until now, in its documents and verbal presentations describing the proposed regulation, NOAA has rather blithely asserted that the agency's counsel have concluded that sufficient authority exists to promulgate the rule. This is not sufficient! NOAA must produce and make public a written analysis of the serious legal issues regarding the geographic application of the ESA and the MMPA.

MODELING

The *Federal Register* document contains this statement: "Recent modeling exercises suggest that if current trends continue, the population could go extinct in less than 200 years." This extrapolation is based on a cited study. PVA does not have the expertise to agree with or object to the conclusion of this research. However, PVA strongly objects to NMFS making this statement as if it were a fact. A 200-year time frame in a modeling projection is meaningless, and it is ludicrous for the agency to accept this projection as proven. For example, the current Administration strongly rejects conclusive assertions as to global warming, even though the modeling envisions a time period of only a few decades, not 200 years. How can NMFS endorse the conclusions of a single modeling study that covers a time equivalent to the time between the Revolutionary War and the U.S. Bicentennial?

ENVIRONMENTAL IMPACT STATEMENT

NMFS officials have stated that only an Environmental Assessment of the proposed rule will be performed. This decision does not seem to be addressed in the *Federal Register* documents. Has the Council of Environmental Quality "signed off" on

this decision not to undertake a full Environmental Impact Statement? PVA recommends that NMFS reconsider its initial decision. Given the potential and wide-ranging impact to the port and maritime community, an Environmental Impact Statement is warranted.

AVAILABILITY OF DRAFT STRATEGY

Throughout the *Federal Register* notice, there is discussion of the development of a draft *Strategy to Reduce Ship Strikes of Right Whales*. PVA has found a link to a powerpoint presentation with this title on a NOAA web page. Is this the *Strategy*? Is there an actual document other than this presentation? If so, why has it not been released to the public? If not, is the only summary of the *Strategy* the discussion contained in your *Federal Register* notice?

ENFORCEMENT

Is the Coast Guard prepared to devote funding and resources to enforcing this rule? PVA has seen no indication whatsoever that this issue is of serious concern to the Coast Guard. To the contrary, since September 11, 2001, the Coast Guard has made U.S. maritime security its number one mission. Congress has confirmed this reorientation by moving the Coast Guard to the Department of Homeland Security and by heaping upon it numerous new tasks to implement the Maritime Transportation Security Act of 2002. Other traditional missions of the Coast Guard have been shortchanged by this change of emphasis. How can NMFS expect the Coast Guard to be willing to undertake a responsibility for enforcing speed limits and routing restrictions for hundreds, if not thousands, of vessels? No other agency has the assets and manpower to properly enforce the proposed rule.

No federal agency should impose regulatory restrictions on the private sector when there is not a realistic way to enforce the rule.

CONCLUSION

The Passenger Vessel Association and its members can not support the rule as proposed.

The potential economic and operational impact of vessel speed limits and routing restrictions on U.S.-flagged ferries (especially high-speed ferries), whalewatching operators, and small-ship coastal cruise vessels may be significant and harmful. NMFS has failed to examine the economic impact of the proposed rule on this important segment of the U.S. maritime community. Not only is data about vessel strikes of northern right whales very limited, it provides no record of an animal of this species being struck by these classes of vessels. Furthermore, the agency has not fully explained the legal reasoning for full enforcement of the rule within the U.S. exclusive economic zone, particularly the need for action by the International Maritime Organization.

PVA acknowledges the need to take measures to protect endangered right whales. No vessel member wishes to strike a whale. Those PVA members engaged in offering commercial whalewatching ventures have an economic stake in preserving whales of all species. These operators play an important role in introducing marine mammals to the general public. In doing so, they help establish a political consensus in favor of efforts to preserve and restore whales and marine mammals of all species. PVA has aggressively advocated adherence to NMFS whale viewing guidelines. PVA stands ready to support measures that will protect northern right whales if those measures are supported by reliable data, if likely economic impacts have been thoroughly examined, and if the measures are likely to be effective in achieving their goals. It is PVA's view that NMFS currently is not able to demonstrate that the proposed rule will satisfy these conditions.

Sincerely,

A handwritten signature in black ink that reads "Edmund B. Welch". The signature is written in a cursive style with a large, stylized "E" and "W".

Edmund B. Welch
Legislative Director

U.S. EAST COAST FERRY, WHALEWATCHING, AND SMALL-SHIP CRUISE OPERATORS

PVA Companies Operating "Small-Ship" or "Pocket" U.S.-flagged overnight cruise vessels along U.S. East Coast

American Cruise Lines, Stamford CT

American Eagle
31 staterooms

American Glory
31 staterooms

American Spirit (to be placed into service in 2005)
92 pax

All three vessels engage in domestic U.S. East Coast itineraries

American Canadian Caribbean Cruise Lines, Warren RI

Grande Mariner
100 pax
97 gross tons

Grande Caribe
94 gross tons
100 pax

Niagara Prince
84 pax
99 gross tons

Various East Coast itineraries

Clipper Cruise Line (New World Ships, St. Louis)

Nantucket Clipper

100 pax
95 gross tons

Alexandria VA to Jacksonville FL
Jacksonville to Charleston

Companies Operating Whalewatching Vessels Along U.S. East Coast

Bar Harbor Whale Watch Co., Bar Harbor, ME
First Chance Whale Watch, Kennebunk, ME (not a PVA Member)
A.C. Cruise Line, Boston
Boston Harbor Cruises, Boston
Cape Ann Whale Watch, Gloucester
Dolphin Fleet of Provincetown, Provincetown
Hyannis Whale Watcher Cruises, Barnstable
Massachusetts Bay Lines, Boston
Portuguese Princess Excursions, Provincetown
Newburyport Whale Watch (not a PVA member)
Captain Bill's Whale Watch and Fishing, Gloucester, MA (not a PVA member)
Capt John Boats, Plymouth, MA (not a PVA member)
Walsh's Deep Sea Fishing, Inc., Lynn (fishing only)
Yankee Whale Watch and Deep Sea Fishing, Gloucester
Swift Cat Enterprises LLC, Atlantic Highlands, NJ (charter fishing)
Back Harbor Marine (Cape May Whale Watcher), North Cape May, NJ
Cape May Whale Watch and Research Center, Cape May NJ (not a PVA member)
Rudee Inlet Cruises, Virginia Beach, Virginia (not a PVA member)

PVA Members Operating Ferries Along U.S. East Coast

Casco Bay Lines, Portland, ME
Maine State Ferries, Rockland, ME
Hy-Line Cruises, Hyannis
Boston Harbor Cruises, Boston
(Boston to Provincetown)
Bay State Cruises, Boston (not a PVA member)
Island Commuter Corporation, Falmouth
New England Fast Ferry
(Providence to Newport, RI)
(New Bedford to Martha's Vineyard)
Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, Woods Hole
RIPTA, Rhode Island Public Transit Authority, Providence
(vessel operated by New England Fast Ferry)
Vineyard Fast Ferry, North Kingston, RI
(Quonset Point, RI, to Martha's Vineyard)
Cross Sound Ferry Services, New London
(New London, CT, to Long Island)
Nelseco Navigation, New London
(Point Judith, RI, to Block Island)
Fox Navigation, Mashantucket, CT

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PVA Members Operating Ferries Along U.S. East Coast (continued)

Bridgeport/Port Jefferson Steamboat, Port Jefferson, NY

(Port Jefferson NY to Bridgeport CT)

Fishers Island Ferry District, Fishers Island, NY

(New London CT to Fishers Island, NY)

Staten Island Ferry, Staten Island, NY

Viking Fleet, Montauk, NY

New York Waterway, Weehawken, NJ

Seastreak America, Atlantic Highlands, NJ

Cape May-Lewes Ferry, North Cape May NJ

(Cape May NJ to Lewes, DE)

North Carolina State Ferries, Morehead City, NC